Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

COMMENTS
of
NRTA and OPASTCO

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April 22, 2002

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SUMMARY

NRTA and OPASTCO are in agreement with the Commission's goals in this proceeding to ensure the stability and sufficiency of the USF as the marketplace evolves; to assess contributors in an equitable and nondiscriminatory manner; and to provide certainty to market participants and minimize the regulatory costs of compliance. To that end, the associations are supportive of the Commission exploring a flat-fee monthly contribution assessment mechanism. However, we do not endorse the "connection"-based assessment methodology proposed in the FNPRM, as it fails to comply with the 1996 Act and meet the Commission's own goals.

Perhaps the biggest deficiency of the end-user connection proposal is that it violates the mandate that "every telecommunications carrier that provides interstate telecommunications shall contribute on an equitable and nondiscriminatory basis…." Specifically, the proposal would practically exempt from making contributions providers whose principle offering is the interstate transmission that actually gives any telecommunications service its interstate character. At the same time, it would impose a discriminatory and inequitable contribution obligation on carriers whose primary interstate service is merely to provide the originating and terminating exchange access. A contribution assessment mechanism cannot exempt the quintessentially "interstate" operations of the IXCs and comply with §254(d). If LECs are to contribute under a flat-fee mechanism, then the IXCs must pay monthly contributions of at least the same amount for each of their interstate customers. Moreover, when an IXC, wireline or wireless carrier provides both exchange access to interstate service and the actual interstate transmission link, that carrier should

contribute for each of those services to ensure equity and nondiscrimination among carriers and customers.

Another serious deficiency in the Commission's proposal is that it fails to include all facilities-based broadband Internet access providers as contributors, instead choosing to address this issue in a separate proceeding. By addressing this issue separately, it is impossible for the Commission to know whether any new mechanism it adopts will ensure the long-term stability and sufficiency of the USF or to provide certainty to market participants. It also leaves open the question of whether a new plan will operate in an "equitable and nondiscriminatory manner."

To adopt a new assessment mechanism without also including all facilities-based broadband Internet access providers would not address a major cause of the instability of the present system. In addition, as the amount of interstate traffic that migrates to broadband platforms and IP networks grows, it becomes increasingly inequitable and discriminatory to require only wireline telecommunications carriers to contribute on the basis of their broadband transmission service offerings while other broadband providers contribute nothing. Thus, the FCC cannot achieve its goals or Congress's intent unless it simultaneously includes all facilities-based broadband Internet access providers in the list of contributors.

The Commission must also abandon its proposal to assess capacity-based connection charges for multi-line business customers, as it is overly complex and has great potential to be inequitable and discriminatory. For instance, the "three tiers of capacity" proposal in the FNPRM could lead some high-volume customers to purchase high-capacity connections in order to minimize their universal service obligation, which, in turn, would disproportionately burden small businesses with lower-capacity connections. Marketplace distortions could also

result if the arbitrary multipliers used in conjunction with the "base factor" are poorly chosen. In addition, under any new assessment mechanism, the Commission must take great care to treat Centrex lines and PBX lines in a competitively neutral manner.

The Commission should bifurcate the contribution assessments for the high-cost program from the schools and libraries and rural health care programs. These programs have entirely different purposes and are addressed separately in the 1996 Act. Separating the assessments would provide carriers and their customers with the knowledge of how much they are contributing to each of the programs. This would fulfill the statutory requirements for explicit support in §254(e) and be consistent with the Commission's truth-in-billing principle of providing customers with "full and non-misleading descriptions."

The Commission must not adopt a collect and remit system, as it would jeopardize the sufficiency and predictability of the support mechanisms. Section 254(d) places the contribution obligation on "every telecommunications carrier," and not on end-users. Moreover, the substantial reserve fund that would be needed to account for the potential shortfalls in the fund would be unfairly biased against the customers who actually pay the surcharge and the carriers who maintain the best track record in collecting the contributions.

Finally, all carriers should be prohibited from recovering universal service contributions from their Lifeline subscribers if the Commission decides to exempt Lifeline connections from the contribution base. Permitting all other carriers to continue to impose a universal service fee on Lifeline customers while ILECs remain prohibited from doing so would not be competitively neutral and would be at odds with the very purpose of the Lifeline program.

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I. INTRODUCTION

The National Rural Telecom Association (NRTA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submit these comments in response to the FCC's Further Notice of Proposed Rulemaking in

the above captioned proceedings.[1] The Commission is seeking comment on a proposal to assess universal service contributions based on the number and capacity of "connections" provided to a public network.[2]

NRTA is an association of incumbent local exchange carriers (ILECs) that obtain financing under Rural Utilities Service (RUS) and Rural Telephone Bank (RTB) programs. OPASTCO is a national trade association representing over 500 small telecommunications carriers serving rural areas of the United States. All of the members of both associations are rural telephone companies as defined in 47 U.S.C. §153(37). In addition, almost all of the members of both associations rely on some form of federal universal service funding to provide affordable, high-quality service within their high-cost, rural territories. Thus, NRTA and OPASTCO have a paramount interest in ensuring the long-term stability and sufficiency of the high-cost universal service programs.

II. THE COMMISSION SHOULD FAITHFULLY COMPLY WITH SECTION 254 AND THE STATUTORY PRINCIPLES IN REVISING THE UNIVERSAL SERVICE CONTRIBUTION METHODOLOGY

The Commission suggests three goals for improving the current system of carrier and provider contributions to fund the federal universal service programs.[3] Its primary goal is "to ensure the stability and sufficiency of the universal service fund as the marketplace continues to evolve."[4] The goals and methods must, of course, faithfully follow the statute and the intent of Congress.

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[1] *Federal-State Joint Board on Universal Service, et. al.,* CC Docket No. 96-45, et. al., Further Notice of Proposed Rulemaking, FCC 02-43 (rel. February 26, 2002) (Further Notice, FNPRM).

[2] NRTA and OPASTCO demonstrate in these comments that singling out an end user's physical connection to a public network, which the proposal in the Further Notice would use as the basis for universal service contribution assessments, conflicts with the statute. Instead, the end-user physical connection standard should be replaced with a flat-fee monthly assessment on all providers of telecommunications services and telecommunications necessary for a customer's participation in end-to-end interstate communications.

[3] FNPRM, para. 15.

[4] *Id.*

The Commission's first goal goes to the heart of the statutory objective and requirement for "specific, predictable, and sufficient mechanisms" to preserve and advance universal service" (§254(d)) and "support" that is "sufficient to achieve the purposes of this section" (§254(e)).[5] NRTA and OPASTCO endorse this goal and agree that it should rank first in the Commission's considerations.

The Commission's second goal is to assess contributors "in an equitable and nondiscriminatory manner."[6] This goal, too, is grounded in the statute. Section 254(d) provides for carrier contributions "on an equitable and nondiscriminatory basis" and for contributions by "telecommunications" providers whenever the Commission decides "the public interest requires" such contributions. NRTA and OPASTCO agree that this is a central goal, which we would restate as the goal of making the contribution base for funding as broad as possible. Commensurate responsibility must extend to all who use telecommunications to access a public network in the emerging "network of networks." Ensuring this specific and inclusive level of fairness will meet the Commission's objective by maximizing fairness to the end-users that ultimately support universal service, by keeping their universal service costs both as equitable and as low as possible. Ensuring that the list of those obliged to contribute is expansive enough to embrace all competitors and all technological platforms will maximize fairness to carriers and providers in accordance with this Commission goal, by lessening contribution burdens on any particular class of contributors and avoiding competitive distortions.

[5] *Quest Corp. v. FCC*, 258 F. 3rd 1191 (10th Cir. 2001).
[6] FNPRM, para. 15.

The Commission's third goal is to "provide certainty to market participants and minimize the regulatory costs" of compliance.[7] The first prong of this dual goal is another way of saying that support should be predictable, a statutory term, and stable, an important element of the first goal. Minimizing regulatory costs is surely a worthy goal and should promote simplicity and efficiency. However, the Commission must not forget that the statutory requirements come first: It cannot lawfully skimp on support sufficiency or equitable and nondiscriminatory treatment simply to cut corners or spare some customers or segments of the industry burdens borne by others.

III. WHILE A FLAT-FEE MONTHLY CONTRIBUTION ASSESSMENT METHODOLOGY MAY BE A BETTER WAY TO SUSTAIN THE UNIVERSAL SERVICE SUPPORT MECHANISMS FOR THE LONG TERM, THE FNPRM'S "CONNECTION"-BASED ASSESSMENT PROPOSAL HAS SERIOUS DEFECTS THAT MUST BE CORRECTED BEFORE IT CAN LAWFULLY BE ADOPTED

A. Overview

The FNPRM discusses several trends occurring in the marketplace for interstate telecommunications services that appear to jeopardize the long-term sustainability of the present contribution methodology, which is based on carriers' historical end-user interstate and international telecommunications revenues. As the Commission notes, interstate revenues have begun to decline for interexchange carriers (IXCs), whose contributions presently account for more than half of universal service funding.[8] This places upward pressure on the contribution factor, which IXCs say will reach an unsustainable or unacceptable level in the not too distant future.

While IXCs' interstate revenues may be declining, overall demand for interstate telecommunications and information services has probably never been greater. The demand

[7] *Id.*

is simply shifting to service packages and service providers in which either the precise portion of revenues attributable to interstate telecommunications cannot easily be identified[9] or the service provider is not presently required to contribute to universal service. Thus, in order to produce a contribution system that is stable and sufficient for the long-term,[10] the Commission needs to spread the contribution responsibility over all providers of interstate telecommunications services and interstate telecommunications, while balancing the principles of equity, competitive neutrality, and administrative simplicity. NRTA and OPASTCO believe that a flat-fee mechanism could best achieve these goals, provided that it requires all providers of interstate telecommunications services and interstate telecommunications to contribute in an equitable and nondiscriminatory manner.[11]

Probably the biggest present threat to the sustainability of the current revenues-based contribution mechanism is the growing migration of interstate calls to mobile wireless networks and the "interim safe harbor" percentages wireless carriers are permitted to use to determine the level of interstate revenues on which their universal service contributions are assessed. Specifically, for cellular and broadband personal communications service (PCS) providers, the safe harbor is 15 percent.[12] As the FNPRM notes, in contrast to when the current assessment system was adopted in 1997, virtually all of the major mobile wireless

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[8] FNPRM, para. 7.

[9] Even the IXCs themselves have begun to bundle inter- and intrastate toll calls and local calling into "one-rate" packages. For example, the AT&T Unlimited Plan provides unlimited state-to-state, in-state and local toll calls to all other AT&T residential subscribers for $19.95 a month. *See,* www.shop.att.com. Similarly, MCI/Worldcom offers "The Neighborhood," which provides unlimited long distance and local calls and several calling features for a flat monthly rate. *See,* www.mci.com.

[10] FNPRM, para. 15.

[11] In comments submitted in the 2001 Notice in this proceeding, OPASTCO supported the continuation of the present revenues-based methodology. However, in light of the rapidity with which the trends discussed above and in the Further Notice are occurring, OPASTCO has re-evaluated its position and is now supportive of a flat-fee methodology in which all providers of interstate telecommunications services and interstate telecommunications contribute to the universal service mechanisms in an equitable, nondiscriminatory, and competitively neutral manner.

service providers now offer bundled local and national long distance service for one flat rate.[13] In turn, both mobile telephony subscribership and the average monthly customer minutes of use on these networks have approximately doubled since 1997.[14] Yet, the overall end-user switched interstate telecommunications revenues which make up the contribution base are now on the decline.[15] Thus, it is obvious that the percentage of mobile wireless providers' total revenue that is attributable to interstate calling is actually much higher than the Commission's interim safe harbor percentages.[16]

A more gradual but growing trend that is causing the decline in the contribution base is the use of Internet Protocol (IP) networks -- which consumers use in various ways (*e.g.*, e-mail, instant messaging, Internet telephony) and obtain via various broadband platforms (*e.g.*, wireless, cable, satellite) -- to substitute for interstate calls on the public switched network. Presently, only wireline telecommunications carriers that provide broadband access to the Internet are required to contribute to universal service. However, regardless of the type of provider or platform through which broadband Internet access is provided, these services almost always involve an interstate telecommunications component.[17]

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[12] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21258-59, para. 13 (1998).
[13] FNPRM, para. 12.
[14] *Id.*, para. 11.
[15] *Id.*, para. 8.
[16] The Commission acknowledged as much in the 2001 Notice in this proceeding. *See, Federal-State Joint Board on Universal Service, et.al.*, CC Docket No. 96-45, et.al, Notice of Proposed Rulemaking, 16 FCC Rcd 9892, 9900, para. 12 (2001) (2001 Notice).
[17] *See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9175, para. 52 (2001) (Intercarrier Compensation Order) ("The Commission has held and the Eighth Circuit has recently concurred, that traffic bound for information service providers (including Internet access traffic) often has an interstate component"). *See also,* 47 U.S.C. §153(20) ("The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" (emphasis added)).

The migration of interstate telecommunications traffic to wireless and IP networks, along with the other trends discussed in the Further Notice, have led NRTA and OPASTCO to believe that a very broadly based flat-fee contribution methodology may be the most efficient and equitable way to overcome these obstacles and ensure the long-term stability and sufficiency of the universal service mechanisms. A flat-fee contribution methodology would provide an administratively easy way for mobile wireless carriers and broadband Internet access providers to contribute their "fair share" toward the universal service mechanisms, and avoid the complexity of trying to determine the interstate and international telecommunications portion of these largely unregulated providers' revenues. It would also provide somewhat improved contribution equity and competitive neutrality between and among wireline carriers, wireless carriers, and all broadband Internet access providers, which do not exist at all today.

However, while NRTA and OPASTCO are supportive of exploring a flat-fee monthly contribution mechanism, we do not endorse the "connection"-based assessment methodology proposed in the FNPRM, as it has some serious deficiencies. Specifically, the Commission's proposal lacks an "equitable and nondiscriminatory" contribution from IXCs as required by §254(d); it lacks the inclusion of all broadband Internet access providers as contributors; and it has an unnecessarily complex and inaccurate system for determining contributions for multi-line business (MLB) subscribers. Also, by continuing to lump assessments for the high-cost program together with assessments for the schools and libraries and rural health care programs, the Commission's proposal fails to recognize the significant differences between these support mechanisms and fails to inform consumers of what their universal service dollars support. What follows, then, is a more detailed discussion of the serious flaws in the

FNPRM's proposal, which need to be corrected before the Commission can adopt any type of flat-fee monthly contribution assessment mechanism.

B. Any flat-fee monthly contribution assessment methodology must exact an "equitable and nondiscriminatory" share of contributions from "every" interstate carrier

Section 254(d) specifies that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." "Every carrier" means "every carrier." One solid legal obstacle to the end-user connection proposal in the FNPRM is that it exempts some interstate telecommunications carriers. By doing so, moreover, the proposal places an inequitable and discriminatory contribution obligation on all carriers other than the very carriers that provide the actual interstate telecommunications transmission path that is the sine qua non for classifying any communications as "interstate." A plan in compliance with §254(d) cannot fail to exact any contributions from the traditional interstate IXCs for their quintessentially "interstate" operations. It is not surprising that IXCs are the ones leading the charge in this assault on the plain language of the statute, since they are the ones that the plan would virtually exempt from their statutory lead role in contributing to federal funding. The FCC will obviously have to fix this glaring legal error before it can go forward with any flat-fee assessment plan.

The Act is equally clear about what constitutes the core characteristic of interstate communication: The term ``interstate communication'' or ``interstate transmission'' means communication or transmission "(A) from any State … to any other State …."[18] These

[18] 47 U.S.C. §153 (22).

services, of course, remain the principle interstate business of the IXCs. Nevertheless, they would be exempt from any contribution under the end-user connection plan, except to the limited extent that the IXC also provided access, a different service, directly to its long distance customer. That is, the physically interstate piece that gives any "telecommunication" or "telecommunications service" its interstate character would be exempt.

In contrast, carriers providing exchange access, "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services"[19] would be heavily assessed. To be sure, this carries forward the Commission's policy that

> [t]he origination or termination of an interstate communication, including the use of a local loop between an end user's home or office and a local switch of a local exchange carrier, is necessarily a part of an interstate communication.[20]

This access jurisdiction, in turn, is based on the Commission's interpretation that a communication's jurisdiction is determined by the end-to-end characteristics of the call.[21] It is clear, however, that the interstate classification of the call is justified solely on the basis of the connection to the actual state-boundary-crossing interstate link that the FNPRM's connection-based plan would basically ignore. Indeed, the treatment of many ILECs as "interstate carriers" that offer "interstate access" is, at most, extremely limited, since §2(b)(2) specifies that the Communications Act shall not

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[19] 47 U.S.C. §153(16).

[20] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983), para.58 (Access Charge Order), modified on reconsideration, FCC 83-536, 48 Fed. Reg. 10319, 54 RR2d 615 (released on August 22, 1983 (First Reconsideration Order), further modified on reconsideration, FCC 84-36, 49 Fed. Reg. 7810, 55 RR2d 785 (released February 15, 1984) (Second Reconsideration Order), aff'd in part, remanded in part, *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC* (NARUC v. FCC), 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, U.S.L.W. (Feb. 19, 1985).

[21] *See,* Intercarrier Compensation Order, 16 FCC Rcd 9159, para. 14 (noting longstanding rule that "the jurisdictional nature of ISP-bound traffic should be determined, consistent with Commission precedent, by the end points of the communication") (footnote omitted). *See also, GTE Telephone Operating Cos., GTOC Tariff*

> apply or…give the Commission jurisdiction with respect to… any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier.

The proponents' argument that the interstate carriers will contribute to the extent that they act as competitive local exchange carriers (CLECs) or provide direct connections to a certain minority portion of their customers stands the statute on its head. NRTA and OPASTCO are not arguing that the interstate tail represented by the interstate subscriber line charges (SLCs) should be wholly excused from contribution. However, the associations strongly object to the notion that the tail should take the place of the interstate telecommunications carrier dog. The Commission wisely questions whether the minimal contribution responsibility claimed by the IXCs under the connection-based proposal can satisfy the statute. It plainly cannot.

The Commission's uneasiness with fitting the plan under the statute is evident, too, when it acknowledges that the end-user connection approach poses another legal problem: Some undeniably interstate carriers, "such as pure resellers of interexchange services, do not provide connections to a public network."[22] These carriers, explains the Commission, like other

> non-connection-based interstate telecommunications service providers, such as exclusive providers of pre-paid calling cards or dial-around services, … would not contribute under the proposed methodology.[23]

Here, again, the proposed "solutions" serve only to expose the legal and logical holes in the entire proposal. Pure resellers, one suggestion goes, should pay some minimum contribution.

No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22478-79, para. 22 (1998).

[22] FNPRM, para. 66.

Or, they, like calling card and dial-around telecommunications service providers, could be exempted by revising the Commission's exercise of its *de minimis* exemption authority.[24] The first "fix" is silly because it would create a regime where the clearest interstate providers of all would only be covered by virtue of an exception. The second is circular and manipulative. These carriers, whose primary business is providing the indispensable interstate link needed to make any telecommunications interstate in nature would be excluded as *de minimis* under a plan which minimizes their contribution so that they wind up falling into the desired exempt category.

The unavoidable fact is that eliminating or minimizing the contribution obligations of the traditional interstate carriers and the majority of the interstate transmission path violates the mandate that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute." Thrusting the vast majority of the burden on carriers that are only adjuncts to the favored interstate carriers' services violates the mandate that all interstate carriers contribute "on an equitable and nondiscriminatory basis."[25]

To go forward with a flat-fee approach at all, the Commission needs to mend its statutory fences. At the very least, for example, the Commission will have to drop the unworkable "end-user connections provided to a public network" concept and redefine "connection" to include a customer contact with an interstate carrier. A customer

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[23] *Id.*, para. 68.

[24] "The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis." 47 U.S.C. §254(d).

[25] The Commission should not attempt to buffer the impact of its plan by freezing the current share paid by various parts of the industry. Whatever plan the Commission ultimately adopts, it must rectify the current technologically and competitively non-neutral wireless "safe harbor." The combination of wireless carriers' burgeoning use of bundled interstate and other services, their enormous service areas, the federally-licensed spectrum foundation of their services, and their virtual immunity from state regulation makes it ludicrous for them to have an artificially limited interstate contribution exposure. Under any logical analysis, these carriers are interstate, not intrastate, creatures.

arrangement, contact, agreement -- or whatever one chooses to call it -- with an interstate, interexchange provider is a condition precedent to completion of any communication that uses any network for state-to-state transmission. That connection is even more basic than local access service. If LECs providing end-user interstate connections are to contribute, then, the IXCs must, at the very least, pay monthly contributions of the same amount for each of their interstate customers.[26] Moreover, when an IXC, wireline or wireless carrier provides both local access to interstate service and the customer's actual interstate transmission link, that carrier should contribute for each of those services to ensure equity and nondiscrimination among carriers and among customers. In any event, the Commission cannot adopt, without significant changes, the proposed plan that unlawfully spares interstate IXCs from compliance with §254(d).

C. The Commission must not adopt a flat-fee monthly contribution assessment methodology without simultaneously requiring all facilities-based broadband Internet access providers to contribute to universal service

Section 254(d) provides that "[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires." The Commission has exercised this authority in the past, for example, to require private service providers and aggregators to contribute. As far back as 1998, it has espoused the policy that "the public interest requires a broad contribution base so that the burden on each contributor will be lessened"[27] and to prevent competitive disparities

[26] These assessments could be made, for example, on the basis of presubscribed lines, dial-around accounts and a per-card charge for pre-paid calling cards. It would be necessary to set such charges to avoid distorting market choices among competing carriers and technologies.

[27] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11565 [11 CR 1312], para. 132 (1998) (Report to Congress). The Commission also interprets §254(d) to require broad application of the mandatory contribution requirement. *Id.*

due to different contribution obligations.[28] The FNPRM points out that:

> more and more carriers now offer bundled packages of telecommunications services and customer premises equipment (CPE) or information services. The accelerating development of new technologies like "voice over Internet" increases the strain on regulatory distinctions such as interstate/intrastate and telecommunications/non-telecommunications, and may reduce the overall amount of assessable revenues reported under the current system.[29]

In the past, the Commission has excused Internet access providers from contributions on the basis of statutory interpretations and analysis that confused "telecommunications" and "telecommunications services" and their regulatory consequences. It strained the statutory definitions to accommodate the Internet in its infancy. A distinction between "using" and "providing" telecommunications invented by a previous Commission has narrowed the flexibility the Commission should have under the statute as Congress enacted it. The Commission recognized that it would have to revisit the conclusion with regard to Internet telephony and other Internet access issues later.[30] That time is long overdue, but there is little to be gained from sorting through the convoluted interpretations that have strayed from Congress's intent. The Commission would do better to discard all its earlier interpretations, especially those which have been outdated by technology and service transformations. It should then start from the statutory language and read the terms in §254(d) rationally to include all telecommunications services and telecommunications inputs that provide access to any part of the network of networks.

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[28] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9177, para. 783 (1997) (Universal Service Order) ("broadly construing the definition of interstate telecommunications is consistent with the statute and necessary to achieve our policy goals and those of the Joint Board in this Order. … It is … competitively neutral to require all carriers and "other providers of interstate telecommunications" to contribute to the support mechanisms because it reduces the possibility that carriers with universal service obligations will compete directly with carriers without such obligations").

Instead, the FNPRM defers consideration of the obligations of Internet access providers here on the mistaken ground that the issues of whether "in an evolving telecommunications marketplace, … facilities-based broadband Internet access providers [should] be required to contribute to support universal service" is a "different but related issue."[31] The Commission is aware that the question of "what universal service contribution obligations providers of facilities-based broadband Internet access should have as the telecommunications market evolves" is implicated in the statutory duty of treating carriers in "an equitable and non-discriminatory manner." However, the Commission plans to consider the total revamping of how contributors are assessed without simultaneously resolving the inextricably related "other provider" issues.[32]

The fallacy of the Commission's approach is that it makes impossible both the application of the statute to the facts and the Commission's evaluation of any new contribution methodology under its goals. How can the Commission decide whether a flat-fee mechanism will "ensure the stability and sufficiency of the universal service fund as the marketplace continues to evolve,"[33] if it does not consider how broad the contribution base will be until after the plan has been adopted? How can it decide if carriers' contributions under a new plan will operate in an "equitable and nondiscriminatory manner," if current and potential competitors and their customers are left out of the equation until after the decision has been made? How can the Commission "provide certainty to market participants"[34] in this

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[29] FNPRM, para. 13.
[30] Report to Congress, 13 FCC Rcd 11536-11553, paras. 73-106.
[31] FNPRM, para. 4.

[32] The FNPRM's only nod to the interdependence of these issues and proceedings is to observe that: "Commenters should be mindful of the relationship between this proceeding and the Broadband NPRM proceeding and, where appropriate, should address interrelated issues raised by the proposals detailed below." *Id.*
[33] *Id.*, para. 15.
[34] *Id.*

proceeding when it has consigned to another day decisions regarding the fastest growing segments in the marketplace? And, finally, how can the Commission expect to "minimize … regulatory costs"[35] when it is dividing a single universal service issue into two separate proceedings?

NRTA and OPASTCO recognize that there are questions raised in the Broadband NPRM,[36] regarding the classification of wireline broadband Internet access, which impact the issue of the Commission's use of its permissive authority to require these service providers to contribute to universal service. Likewise, determinations made regarding regulatory classifications for other broadband platforms in other proceedings raise similar universal service obligation issues. Nevertheless, the inclusion of all facilities-based broadband Internet access providers as universal service contributors – regardless of their classification – is essential to the stability, sufficiency, competitive neutrality, and equity of any flat-fee contribution mechanism. Therefore, the Commission must not adopt such a mechanism without first, or concurrently, including these providers as contributors.

If the marketplace is evolving toward broadband platforms and IP networks, then adopting a flat-fee mechanism without also including all facilities-based broadband Internet access providers would not address a major cause of the insustainability of the present revenues-based system that gives rise to this proceeding. By requiring facilities-based broadband Internet access providers over all platforms to contribute, the contribution base is significantly widened. This, in turn, lessens the contribution burden on every service provider and sustains the contribution mechanism for the long term as a growing amount of interstate

[35] *Id.*

[36] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers,* CC Docket No. 02-33, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer*

traffic migrates to broadband platforms and IP networks. In contrast, it is not worth disrupting the present balance of contribution obligations and placing an increased burden on low-volume subscribers until such time as all facilities-based broadband Internet access providers, over all platforms, are required to contribute.

In addition, as previously noted, only wireline telecommunications carriers presently have to contribute to universal service on the basis of revenues earned from broadband transmission service.[37] Thus, as the amount of interstate traffic that migrates to broadband platforms and IP networks grows, it becomes increasingly competitively biased to require only wireline telecommunications carriers to contribute, while other facilities-based wireline ISPs, and those providing Internet access over other platforms, contribute nothing. This contradicts the Commission's own competitive neutrality principle for preserving and advancing universal service.[38]

Also, under a flat-fee monthly contribution assessment mechanism, the LEC segment of the industry will be responsible for a much larger percentage of the contribution obligation than has been the case historically. It would be highly inequitable to increase small and rural ILECs' contribution responsibility substantially via a flat-fee mechanism without first, or concurrently, spreading the burden to include all facilities-based broadband Internet access providers.

The Associations therefore strongly urge the Commission instead to decide the broadband Internet access provider aspects of the contribution mechanism here. The best administrative and public policy approach would be to consolidate the universal service issues

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III and ONA Safeguards and Requirements, CC Dockets Nos. 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42 (rel. Feb. 15, 2002), para. 67 (Broadband NPRM).

[37] *Id.*, para. 72.

[38] Universal Service Order, 12 FCC Rcd 8801-8802, paras. 47-48.

into a single proceeding and decide them all together. Any reading of the Commission's goals and the statute leads to the conclusion that the terms "other providers" and "telecommunications" must be broadly construed to "preserve and advance universal service"; that all providers and all customers must be treated "equitably and nondiscriminatorily"; and that doing so would have the least distortive impact on both the telecommunications and information services marketplace. The FCC cannot achieve its goals or Congress's intent unless it simultaneously includes all facilities-based broadband Internet access providers in the list of contributors.

D. The Commission must reject the proposal to assess "connection" charges for multi-line business customers based on capacity

The connection-based assessment proposal would recover the remainder of the total universal service funding needs after residential and single-line business assessments from MLB connections. The plan would base contributions on the capacity of the connections provided, using line speed tiers set to reflect current wireline carrier offerings. The tiers would taper the contributions, providing a "discount in assessments as capacity increases," intended to "reflect the potential efficiencies of scale gained by using higher-speed connections" by reductions in contributions as the connection bandwidth increases.[39]

The discussion in the FNPRM leaves little doubt that the plan for handling MLB connections, especially broadband connections, raises many more questions than it provides answers. In fact, the most that the Commission can say in favor of a capacity scheme seems to be that it gets around the concerns that (1) a single per-connection assessment "would result in low-volume residential connections being assessed at the same rate as higher-volume

[39] FNPRM, para. 53.

multi-line business connections"[40] and (2) "it would be unnecessary to establish voice-grade equivalency ratios for such connections,"[41] a prospect which had led to the rejection of a per-line assessment methodology in its original rulemaking proceeding.

The Commission itself, however, raises many questions about whether a new system of measurements, or tiers of capacity, will be nondiscriminatory and workable.[42] The FNPRM does not even reach the troubling questions about how a capacity-based system would accommodate other broadband offerings, such as satellite, fixed or mobile wireless broadband, and even cable facilities used for broadband services. It is hard to see why creating a whole new set of metrics will be an improvement over the equivalent lines method, which the Commission correctly rejected in 1997 because "the need to establish line-equivalency ratios would make such an approach difficult to administer and could possibly result in a system that is not competitively neutral."[43]

The Commission sees numerous other potential pitfalls, on which it requests comments. It states that the charges for MLB connections will become more variable and unpredictable[44] and may increase for some MLB customers, likely to be small businesses, while favoring certain high-volume business customers.[45] Multi-line business lines are already required to recover significantly more than residential and single-line business lines, and the SLC for MLBs has jumped recently – without even a transition – to $9.20 per line.[46]

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[40] *Id.*, para. 50 (footnote omitted).
[41] *Id.*, para. 44 (footnote omitted).
[42] *Id.*, paras. 52-54.
[43] *Id*., para. 44, citing Universal Service Order, 12 FCC Rcd 9184, para. 796.
[44] *Id.*, para. 51.
[45] *Id.*, para. 53.
[46] *Multi-Association Group Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, *Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers,* CC Docket No. 98-166, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and

Small businesses that confront another increase will be even harder pressed to survive and compete with higher-volume companies, while the higher-volume businesses are already paying high SLCs, themselves. The Commission also acknowledges the danger that how it defines the tiers may "skew marketplace behavior," as customers try to minimize the contribution assessed with regard to their connections, thus shifting costs to lower-volume businesses.[47] Distortions can also result if the multipliers used in conjunction with the "base factor" for one unit of capacity are ill-chosen. Again, the kinds of problems that the Commission feared from trying to use line equivalencies are bound to repeat themselves in this equally arbitrary exercise.

The Commission also raises questions about (a) variations in the capacity of some facilities;[48] (b) the impact on customers of the means chosen to measure "maximum capacity";[49] (c) the terms under which customers of different services may obtain additional capacity;[50] (d) the definition chosen for a "connection";[51] and (e) the application of a capacity or connection method to different network and service configurations, such as Centrex and private systems.[52]

One of the worst potential results, as the Commission seems to realize, is the effect that a connection-based system may have on Centrex lines, especially when compared with the Private Branch Exchange (PBX)-provided lines with which they compete.[53] Regardless of the Commission's reasoning about the proper access charges to apply to these configurations,

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Order in CC Docket Nos. 98-77and 98-166, 16 FCC Rcd 19613, 19639, para 53 (2001) ("We conclude that the multi-line business SLC cap for rate-of-return carriers should increase to the price cap carrier level of $9.20 on January 1, 2002").

[47] FNPRM, para. 53.

[48] *Id.*

[49] *Id.*, para. 55.

[50] *Id.*

[51] *Id.*, para. 56.

[52] *Id.*

there is no conceivable reason that the choice of Centrex service should force the customer to shoulder an inordinately higher share of universal service funding. The result is a violation of competitive and technological neutrality, which the Commission must avoid. Capacity-based comparisons will likely cause or exacerbate countless other problems that will be discovered only after the damage has already been done.

All of these concerns and others will seriously complicate the task of inventing a new capacity-based end-user connection system for MLB lines that will achieve the Commission's goals. There are many warning signs that the results will not be equitable or nondiscriminatory, and that network and service deployment decisions may be seriously skewed by universal service obligation arbitrage. The major questions about how a capacity-based system would work and how it would apply to different platforms lead to the conclusion that it will not provide stable and sufficient support. Nor, by any stretch of the imagination, can a scheme that will have to become extremely complex if it is to work at all and which so clearly poses problems, inequities and market distortions be capable of "provid[ing] certainty to market participants and minimiz[ing] the regulatory costs." Prudent implementation of universal service support mechanisms dictates that the Commission must abandon the fatally-flawed notion of a capacity-based assessment on MLB connections for universal service support contributions.

E. The Commission should bifurcate the contribution assessments for the high-cost program from the schools and libraries and rural health care programs

The high-cost program has an entirely different purpose than the schools and libraries and rural health care programs and therefore the assessments for each should be made

[53] *Id.*

separately. The high-cost program is directed at maximizing subscribership to a defined set of telecommunications services (presently voice-grade) in rural and high-cost areas by spreading the high cost of rural networks nationwide. A high level of subscriber penetration in rural areas directly benefits subscribers nationwide, as the addition of each subscriber makes the network more valuable to all. These economic benefits are known as "externalities." On the other hand, the schools and libraries and rural health care programs have nothing to do with sharing nationwide network cost recovery to maximize penetration to services and achieve "universally" available service for placing and receiving calls. Instead, these programs provide discounts to community institutions for access to advanced telecommunications and information services. This includes discounts for some services – such as Internet access and internal connections – that extend well beyond the list of services supported by the high-cost program.

Even the 1996 Act separates its discussion of these programs. For instance, in the list of universal service principles enumerated in §254(b), the principle of access in rural and high cost areas (§254(b)(3)) is separate from the principle of access to advanced telecommunications services for schools, health care, and libraries (§254(b)(6)). In the provisions concerning the definition of universal service, §254(c)(3) separately addresses services for schools, libraries, and rural health care providers, stating that the Commission may designate "additional services" for these purposes. And, §254(h) separately discusses the purposes for which the discounted services may be used by schools, libraries and rural health care providers, and the ways in which carriers may recover the discounts that they have provided.

Given the entirely different purposes for these programs, the contribution assessments for the high-cost program and the schools and libraries and rural health care programs should be separated. This would provide carriers and their customers with the knowledge of how much they are contributing to each of the programs, which would fulfill the statutory requirements for explicit support in §254(e). The Commission's own truth-in-billing principles support the ability of a carrier to provide its customers with "full and non-misleading descriptions"[54] for each of these programs. Bifurcation would also provide the FCC with the flexibility to use separate contribution methodologies, should it so choose.[55] Therefore, regardless of the contribution methodology the Commission ultimately adopts, it should separate the assessments for the high-cost program from those for the schools and libraries and rural health care programs.

IV. A COLLECT AND REMIT SYSTEM THREATENS THE SUFFICIENCY AND PREDICTABILITY OF UNIVERSAL SERVICE FUNDING AND SHOULD NOT BE ADOPTED

The sufficiency and predictability of the universal service fund is predicated on the fact that every contributing carrier is ultimately responsible for its assigned contribution, irrespective of whether the carrier is able to recover that contribution from its customers. If carriers were relieved of that ultimate responsibility, then shortfalls in the fund would be inevitable, as there would be little incentive to recover the contribution from customers.

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[54] *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7496, para. 5 (1999).

[55] For example, the Commission could adopt a flat-fee assessment mechanism for the high-cost program while maintaining the present interstate revenues-based system for the schools and libraries and rural health care programs.

Thus, a collect and remit system would jeopardize the sufficiency and predictability of the support mechanisms in violation of §254(d) of the 1996 Act.

The FNPRM suggests that in order to account for the potential shortfalls in the fund that would arise under a collect and remit system, a substantial reserve fund would need to be established.[56] However, this would be biased against customers who pay the surcharge and carriers who maintain the best track record in collecting the contributions from their customers. The Commission would, in effect, be encouraging inefficiency and raising the amount that law-abiding customers and carriers have to contribute. Carriers with low levels of uncollected contributions would be subsidizing those carriers with higher levels of uncollectibles. This is unfair to the most efficient carriers and their customers.

Finally, the Commission is correct when it suggests that a collect and remit system may conflict with §254(d), which places the burden on "[e]very telecommunications carrier that provides interstate telecommunications services" and not on end users.[57] The Act clearly places the ultimate responsibility for universal service contributions on carriers. While carriers certainly have a right to try to recoup those contributions from their customers, the contribution obligation may not be written out of the statute.

V. IF THE COMMISSION EXEMPTS LIFELINE CONNECTIONS FROM THE CONTRIBUTION BASE, ALL CARRIERS SHOULD BE PROHBITED FROM RECOVERING UNIVERSAL SERVICE CONTRIBUTIONS FROM THEIR LIFELINE SUBSCRIBERS

The current assessment methodology includes interstate revenues derived from Lifeline customers. In the FNPRM, the Commission proposes to exempt Lifeline connections from the contribution base.[58] Should the Commission make this change, there are both

[56] FNPRM, para. 102.
[57] *Id*.
[58] *Id.*, para. 40.

competitive neutrality and public policy reasons that support prohibiting all carriers from recovering universal service contributions from Lifeline subscribers.

Presently, only ILECs are prohibited from recovering universal service contributions from their Lifeline subscribers.[59] This restriction does not extend to IXCs, CLECs, or mobile wireless carriers. If the revenues earned from Lifeline customers are removed from the contribution base, there is no reason why this mismatch in requirements should continue. Permitting all other carriers to continue to impose a universal service fee on Lifeline customers while ILECs remain prohibited from doing so would potentially allow competitors to charge a lower universal service fee per customer, making them appear more attractive vis-à-vis the ILEC. This would not be competitively neutral.

Furthermore, the whole purpose of the Lifeline program is to increase subscribership among low-income consumers by reducing their monthly charges. It is antithetical to this purpose to permit universal service fees to be imposed on these customers, particularly if the revenues derived from them are removed from the contribution base. Therefore, should the Commission exempt Lifeline connections from the contribution base, it should also prohibit all carriers from recovering contribution costs from Lifeline customers.

VI. CONCLUSION

NRTA and OPASTCO urge the Commission to comply with both the letter and spirit of §254 of the 1996 Act, as well as its own principles, when moving forward with changes to the contribution assessment mechanism for the USF. Exploration of a monthly flat-fee mechanism is good, as it may better ensure the sufficiency and stability of the fund as the marketplace evolves. However, any such mechanism must require truly equitable and nondiscriminatory contributions from all interstate IXCs as well as all facilities-based

broadband Internet access providers. The connection-based system proposed in the FNPRM fails on both counts and must therefore be rejected. Imposing equitable contribution requirements on the broadest possible base of carriers is the best way to ensure the long-term viability of the contribution mechanism. It will also minimize the possibility of placing an overly burdensome support obligation on any one group of carriers or end-users and creating "arbitrage" opportunities from a competitively biased contribution policy. To this end, the Commission should also abandon its unworkable capacity-based proposal for multi-line business connections. And it should separate the assessments for the high-cost program from the schools and libraries and rural health care programs so that carriers and customers are made aware of how much they are contributing to each.

[59] *See,* 47 C.F.R. §69.158, 69.131.

In addition, the Commission must reject a collect and remit system of contribution recovery. Such a system would threaten the sufficiency and predictability of the USF and violate the statute's mandate that carriers, not end users, are ultimately responsible for contributions. Finally, should the Commission decide to exempt Lifeline connections from the contribution base, both competitive neutrality and the public interest dictate that all carriers be prohibited from recovering universal service contributions from their Lifeline subscribers.

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April 22, 2002

CERTIFICATE OF SERVICE

I, Jeffrey Smith, hereby certify that a copy of the comments by the National Rural Telecom Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies was sent on this, the 22th day of April, 2002, by first class United States mail, postage prepaid, to those listed on the attached sheet.

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